

Völkerrechtsblog

Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

≡ Navigation



DISCUSSION

Ascertaining Customary International Law – a relatively straightforward matter?

DAVID KOPPE — 21 October, 2015



1 f t g+ p

This blog post refers to the recent findings of the International Law Commission's (ILC) topic now entitled "Identification of Customary International Law" and addresses some issues, which still remain unsettled even in its current third report (A/CN.4/682) and which call for further considerations.

Irrespective of the dispute about the proper theory of customary international law a settled methodology for ascertaining the existence of a rule of customary

international law is by no means “clearly evident” nor “relatively straightforward” (as Sir Michael Wood, the ILC’s Special Rapporteur of the topic, puts it). This criticism also directs legal doctrine that still wonders at the (overcome) dichotomy of inductive and deductive fashions to ascertain international customary law.

First, the ILC’s self-containment as to a flexible approach is neither comprehensible nor intelligible, especially, if thought has been given to the ILC’s goal of providing guidance for practitioners (“those who may not be international law specialists”). Further, the ILC owes an explanation as to the meaning of flexibility for the method of ascertaining customary law. I have asked the Special Rapporteur of the topic on a recent conference how much state practice is required for saying that a certain customary norm exists. He countered by saying: “*Shall we really tell [the investigator] how much state practice is required?*” In my opinion this would be great, i.e. helpful, but I rather raised the question whether this is a conscious self-constraint (for what reason?) by the ILC or whether it is some expression of surrender to systematization (which remained unanswered by the Special Rapporteur).

It is by no doubt helpful to have some progress with regard to the admissible pieces of evidence for the documentation and proof of state practice or *opinio iuris* (even though the differentiation between the two still lacks answer). It might also be wise to open up the ascertainment process to non-formal argumentation. However, the investigator has to demonstrate that a certain fact is part of a common practice and that this particular practice together with *opinio iuris* vindicates the specific customary rule, including its precise wording. The latter steps are by no means instances, which

can be proven on the criteria of true or false alone. Thus, notwithstanding the classification of the ascertainment process as rule finding or rule justification and irrespective of its classification as consideration of evidence or as application of law there must be some kind of rules governing the assessment and evaluation of facts to provide *real* guidance aiming at the maximum objectivity possible. Hence, the simple locating of pieces of state practice is of minor importance or assistance, whereas their argumentative or judicial appraisal (especially with regard to the subjective element, i.e. *opinio iuris*) is probably of much greater significance for the ascertainment of a rule of customary international law.

Accordingly, the ILC states in its Third Report, that: “... in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.”

The same applies with regard to the role of treaties and resolutions for the process of formation and identification of customary international law. Here, too, “the provisions (and the treaties in which they are incorporated) need to be analysed in their context and in the light of the circumstances surrounding their adoption”. This also holds true with regard to the practice of international organizations, which “in certain cases [...] also contributes to the formation, or expression, of rules of customary international law”.

Thus, according to the ILC the particular appraisal of the single elements and the conclusive appraisal of the customary rule overall does not follow formal rules. The time factor is relative and the number of states participating in custom is relative, too. This goes without further explanation and opens up the ascertainment process for a bunch of (non-) legal arguments, methods and assessments but it might be exactly this step, which decides the existence of a particular customary law rule. This criticism is not to deny that knowledge of the context (which is a paraphrase for knowledge of the overall reality) is relevant to every application of a legal rule to a greater or lesser extent. However, this over-generalization does not provide any straightforward guidance on the ascertainment of customary international law.

Hence, this decisive final (judicial) valuation still lacks systematization and instructions. Quite often interpreters eschew their decision-making responsibility (e.g. by stating, “A *particular customary norm is not yet apparent but evolving.*”). Thus, to speak of a straightforward process one needs the ILC’s guidance on where to find arguments deciding this (final) assessment. Do we have to seek for arguments in social, political and economic sciences or in the specific field of law under consideration (to name just a few points of reference)? Is it really necessary and feasible to decide this matter with the philosophy of sciences?

Straightforwardly put, what makes this final decision plausible?

A response to this post by Curtis Bradley can be found [here](#).

David Koppe (MLE, LL.M.) is a lawyer and research fellow at the Chair for Public International Law, European Law and Public Law at the University of Leipzig. He is also an adjunct lecturer for European Law at the same institution. He racks his brain over objectivity in the assessment of customary international law and calls for more adherence to dogmatics in public international law.

ISSN 2510-2567

Tags: Customary International Law , ILC



Related

Customary international law identification as constrained law-making
26 October, 2015
In "Discussion"

European patients and African remedies
19 January, 2015
In "Discussion"

Re: European Patients and African Remedies
21 January, 2015
In "Discussion"

PREVIOUS POST

< Redressing Colonial Wrongs?

NEXT POST

Internationales Strafrecht in Subsahara-Afrika >

1 Comment



ANOLOGOUS

25 October, 2015 at 14:27 (Edit) – Reply

It would be helpful to have such posts proofread – an interesting topic, no doubt, but use of idiom and innuendo is risky if the author is not a native-speaker. At times it is completely impossible to understand what the author means in this post

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

☐ Notify me of follow-up comments by email.

☐ Notify me of new posts by email.